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Conscientious Objection to Same-sex Marriages: Beyond the Limits of Toleration

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Abstract

When civil servants conscientiously refuse to register same-sex marriages, a clash arises between freedom of religion and same-sex equality. The scholarly world is divided on the optimal way to tackle this human rights clash. States, however, are not. Courts and legislators in the US, the UK and the Netherlands – among others – have decisively and unequivocally sided with same-sex equality. This Article contributes to the debate by presenting an alternative to existing scholarly analyses, which the author finds wanting. The Article's primary aim is to offer a coherent account of the relevant practice in the UK and the Netherlands. The Article's core argument is that this practice is best understood in terms of the limits of toleration in liberal States. The author argues, in particular, that the UK courts and Dutch legislator have drawn those limits at the point where civil servants cause same-sex couples expressive harm.

Keywords

Conscientious objection, exemptions, freedom of religion, same-sex marriage, clashes between human rights, toleration, expressive harm.

1 Introduction

When civil servants conscientiously refuse to register same-sex marriages, a clash arises between freedom of religion and same-sex equality.¹ This human rights clash has been in the spotlights in recent years. It has not only attracted concerted scholarly attention,² but also widespread media coverage. In September 2015, for example, US county clerk Kim Davis made domestic³ and international headlines⁴ when she was jailed for refusing to register any and all marriages in the wake of the Supreme Court's *Obergefell v. Hodges* ruling on same-sex marriage.⁵

But Ms. Davis was certainly not the first, and will probably not be the last, civil servant to refuse to apply the law on same-sex marriage/partnership. In the UK, Lillian Ladele famously preceded her. Following the enactment of the 2004 Civil Partnership Act, Ms. Ladele, a civil registrar for the London Borough of Islington, initially made practical

¹ An anonymous reviewer for *Religion & Human Rights* noted that the term 'conscientious objection' is not uncontroversial in relation to marriage officials, because of the alleged difference with conscientious objection to abortion and military service (both discussed in the Conclusion of this Article). When I utilise the term 'conscientious objection' (and analogues such as 'conscientiously object to') in relation to civil servants, I refer in the first place to the reasons civil servants invoke to refuse to perform marriage services. These reasons are related to their conscience and inability to reconcile the act of registration of same-sex marriages with their religious convictions. In that descriptive sense, their refusal mirrors that of health professionals who refuse to perform abortions and Jehovah's Witnesses or pacifists who refuse to perform military service. Therefore, I consider it appropriate to use the term 'conscientious objection' to describe all three cases.

² Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?', 17 *Res Publica* (2011), pp. 21-40; Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others', 77 *Modern Law Review* (2014), pp. 223-253; Erica Howard, 'Religious Rights versus Sexual Orientation Discrimination: A Fair Deal for Everyone', 10 *Religion & Human Rights* (2015), pp. 128-159; Robin Fretwell Wilson, 'Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws', 5 *Northwestern Journal of Law and Social Policy* (2010), pp. 318-368; Bruce MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages', 69 *Saskatchewan Law Review* (2006), pp. 352-373.

³ Alan Blinder and Tamar Lewin, 'Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage', *New York Times*, 3 September 2015, <www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html>, accessed 26 December 2015.

⁴ Amanda Holpuch, 'Defiant Kentucky clerk summoned to federal court over gay marriage refusal', *The Guardian*, 1 September 2015, <www.theguardian.com/us-news/2015/sep/01/kentucky-clerk-kim-davis-same-sex-marriage-supreme-court>, accessed 31 December 2015; Joan Faus, 'Encarcelada la funcionaria que deniega el matrimonio homosexual', *El Pais*, 4 September 2015, <internacional.elpais.com/internacional/2015/09/03/actualidad/1441317531_656028.html>, accessed 31 December 2015.

⁵ *Obergefell v. Hodges*, 26 June 2015, United States Supreme Court, 576 U.S. ____ (2015).

arrangements with her colleagues to avoid having to register same-sex partnerships.⁶ When word got out about her refusal, however, she was told by her employer that she would have to perform same-sex partnership duties, or risk losing her job. Ms. Ladele took her case to the UK courts, claiming to be the victim of (indirect) discrimination, but the courts ruled against her.⁷

The Netherlands, as well, has been the site of a heated debate on conscientious objection by civil servants to the registration of same-sex marriages, pitching same-sex equality against religious freedom. Initially, the Dutch authorities adopted a pragmatic approach in favour of freedom of religion, under which civil servants were granted exemptions.⁸ But they later departed from that approach, opting for a categorical/principled solution in favour of same-sex equality instead.⁹ In 2014, the Dutch legislator settled the issue by enacting legislation aimed at putting a definitive end to the practice of conscientious objection by civil servants to same-sex marriages.¹⁰

In this Article, I analyse the UK and Netherlands approach in terms of the limits of toleration in the liberal State. My primary aim is to offer a coherent explanation of the relevant practice. I locate that explanation in the political theoretical concept of toleration, and – more particularly – its limits. My core argument is that the UK courts' and Dutch legislator's

⁶ The term 'partnerships' is used throughout to describe the UK case, since the events in the *Ladele* case took place before the enactment of the Marriage (Same Sex Couples) Act 2013. The same arguments, obviously, apply to the current situation, in which marriage is available to same-sex couples in the UK.

⁷ *Ladele v. London Borough of Islington*, 15 December 2009, Court of Appeal for England and Wales, [2009] EWCA Civ 1357. Ms. Ladele also lost her case in Strasbourg, at the European Court of Human Rights. See *Eweida and Others v. the United Kingdom*, 15 January 2013, European Court of Human Rights, Nos. 48420/10 *et al.*. This Article will not analyse the ECtHR judgment, since its reasoning in relation to Ms. Ladele's case is both too short and too deferential to the UK to draw definitive conclusions from. For analyses of the *Eweida* judgment, see Howard, *supra* note 2; Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others', 3 *Oxford Journal of Law and Religion* (2014), pp. 2-24.

⁸ See Opinion 2002-25, 15 March 2002, Equal Treatment Commission (the Netherlands); Opinion 2002-26, 15 March 2002, Equal Treatment Commission (the Netherlands).

⁹ See Opinion 2008-40, 15 April 2008, Equal Treatment Commission (the Netherlands).

¹⁰ Wet van 4 juli 2014 tot wijziging van het Burgerlijk Wetboek en de Algemene wet gelijke behandeling met betrekking tot ambtenaren van de burgerlijke stand die onderscheid maken als bedoeld in de Algemene wet gelijke behandeling [Act of 4 July 2014 amending the Civil Code and the General Act on equal treatment, with regards to civil servants who treat persons differently in terms of the General Act on equal treatment], *Staatsblad* 2014 260 (hereafter 2014 Act).

decisions are best understood as drawing the limits of toleration at the point where civil servants cause same-sex couples expressive harm.

In this Article, I provide an alternative account to existing scholarly analyses of the issue. My aim is, in particular, to improve upon those existing analyses. First, I aim to present an account that is more coherent with the actual practice than accounts that favour the civil servant, proponents of which generally submit that the civil servant should be granted an exemption or be reasonably accommodated.¹¹ Although those accounts may appear powerful on paper, they have one fatal flaw. They fail, quite utterly, to explain the actual practice in States like the UK, Canada,¹² the US and the Netherlands, in which courts and legislators have firmly and unequivocally rejected civil servants' freedom of religion claims.¹³ In this Article, I instead propose an account that is fully consonant with, and successfully explains, the relevant practice.

Second, the approach I propose in this Article aims to avoid the pitfalls into which some accounts that favour same-sex equality have fallen. Most particularly, I avoid hinging the argument on the contested belief-conduct distinction. At least one scholar who relies on the belief-conduct distinction to explain the relevant practice has admitted that it is 'not an ideal conceptual device',¹⁴ since it is potentially 'damaging and counter-productive'.¹⁵ Yet, the

¹¹ Fretwell Wilson, *supra* note 2; Geoffrey Trotter, 'The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants - A Response to Professor Bruce MacDougall', 70 *Saskatchewan Law Review* (2007), pp. 365-392; Andrew Hambler, 'Recognising a Right to "Conscientiously Object" for Registrars whose Religious Beliefs Are Incompatible with their Duty to Conduct Same-Sex Civil Partnerships', 7 *Religion & Human Rights* (2012), pp. 157-181.

¹² *Re Marriage Commissioners Appointed Under The Marriage Act*, 10 January 2011, Court of Appeal for Saskatchewan, [2011] SKCA 3.

¹³ South Africa is an apparent exception among liberal States. *See* Civil Union Act 2007, s 6 ('A marriage officer ... may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.'). It has been noted, however, that this conscience clause would most likely not survive constitutional scrutiny, were it to be challenged before the South African Constitutional Court. *See* Pierre de Vos, 'A Judicial Revolution? The Court-Led Achievement of Same-Sex Marriage in South Africa', 4 *Utrecht Law Review* (2008), p. 172.

¹⁴ Malik, *supra* note 2, p. 38.

¹⁵ *Ibid.*, p. 39.

same scholar did not – at the time¹⁶ – see an alternative way of convincingly arguing in favour of same-sex equality.¹⁷ In this Article, I suggest precisely such an alternative way.

Third, with this Article I aim to improve upon – in my estimation – the best legal scholarly account currently available, that of Robert Wintemute.¹⁸ Wintemute argues, within the framework of reasonable accommodation, that civil servants like Lillian Ladele should not be accommodated, because they cause same-sex couples material harm.¹⁹ Wintemute's account succeeds in explaining the US case of Kim Davis, since she openly refused to register all marriages. She thereby caused same-sex and different-sex couples direct material harm. But Wintemute presented his argument in 2014, prior to the Davis case. He did, however, tackle the UK case of Lillian Ladele. Yet, in relation to her case, Wintemute's argument on material harm goes askew.²⁰ It fails to convince, since Ms. Ladele never openly rejected same-sex couples. Instead, she made arrangements with her colleagues that left same-sex couples in the dark as to her conscientious objection. Moreover, all relevant same-sex couples obtained their partnership registration in Islington, without a hitch. As a result, none of them suffered *material* harm. In this Article, I maintain that they, instead, suffered *expressive* harm. I further step outside – or more accurately, beyond – the reasonable accommodation framework utilised by Wintemute by presenting an analysis in terms of the limits of toleration in the liberal State. I submit that this makes for a more coherent analysis of the issue, which not only concerns law, but also policy. The broader framework of toleration is, in particular,

¹⁶ Malik has since adapted her argument somewhat. In her most recent publication on the issue, she complements her existing analysis with an element of harm and reliance on the public-private divide. This brings her argument closer to the one presented in this Article, albeit in a less fully developed form (Malik does not, for instance, locate or identify the exact nature of the harm). See Maleiha Malik, 'Religion and Sexual Orientation: Conflict or Cohesion?', in G. D'Costa *et al.* (eds), *Religion in a Liberal State* (Cambridge: Cambridge University Press, 2013), pp. 67-92.

¹⁷ Malik, *supra* note 2.

¹⁸ Wintemute, *supra* note 2. For similar arguments, see Howard *supra* note 2.

¹⁹ Wintemute, *supra* note 2.

²⁰ *Ibid.*, p. 242.

better suited than existing accounts to explain legislative interventions, such as in the Netherlands.

2 Case Studies: the UK and the Netherlands

In this Article, I focus primarily on how the UK and the Netherlands have dealt with civil servants who conscientiously refuse to register same-sex marriages/partnerships. The US Kim Davis case, although interesting for the media attention it gathered, is largely left aside. There are two main reasons for this. First, Kim Davis's case is comparatively easy to resolve, given that she caused same-sex (and different-sex) couples material harm by openly refusing to deliver a public service. The UK and Dutch cases, conversely, pose more difficult questions, since no same-sex couple was ever denied a public service in those cases. I aim to provide a coherent account of these harder cases. Second, the Kim Davis case is in several ways peculiar, and therefore less representative of the broader issue. Most importantly, Kim Davis is an elected official who cannot be dismissed from her job, unlike most other civil servants. This explains why she was jailed²¹ for failing to comply with an injunction order,²² ordering her to register same-sex marriages (few other options were available to compel her to fulfil her duties under the law). Given the peculiarity of the Kim Davis case, I have elected to focus on the UK and Dutch cases, which are more representative of the broader issue.

In the UK and the Netherlands, a small number of civil servants refuse, for deeply held religious reasons, to register same-sex marriages/partnerships. In the UK, the issue is

²¹ *Miller v. Davis*, 3 September 2015, United States District Court (Eastern District of Kentucky), No. 15-44-DLB.

²² *Miller v. Davis*, 12 August 2015, United States District Court (Eastern District of Kentucky), No. 15-44-DLB.

epitomised in a leading court case: that of Lillian Ladele.²³ Ms. Ladele is a devout Christian who worked as a registrar of births, marriages and deaths for the London Borough of Islington. During her career, the Civil Partnership Act 2004 came into force. From then onwards, Ms. Ladele was expected to register same-sex partnerships.²⁴ She felt unable to do so, however, because of her 'orthodox Christian view that marriage is the union of one man and one woman for life' and her inability to 'reconcile her faith with taking an active part in enabling same sex unions to be formed'.²⁵ Initially, Ms. Ladele informally arranged for some of her colleagues to take over whenever a same-sex partnership was assigned to her for registration. But when two LGBT colleagues complained to senior Islington staff about Ms. Ladele's conscientious objection, she was informed that she had to register same-sex partnerships herself. Ms. Ladele insisted that she could not comply, since she was being asked to 'facilitate the formation of a union which [she] sincerely believe[d] was contrary to God's law'.²⁶ She invited Islington to accommodate her belief, but her request was refused. She then took her claim to the courts, where the final ruling – by the Court of Appeal²⁷ – would be against her.²⁸ The Court of Appeal held, in particular, that there was no scope for reasonable accommodation and that Ms. Ladele's dismissal would not constitute direct or indirect discrimination.

²³ *Ladele*, *supra* note 7.

²⁴ In implementing the Civil Partnership Act 2004, municipalities were given the choice whether or not to designate all registrars as civil partnerships registrars. Several municipalities chose not to do so, but Islington did assign all its registrars, including Lillian Ladele, the duty of registering civil partnerships (reserved for same-sex couples).

²⁵ *Ladele*, *supra* note 7, para. 7.

²⁶ *Ibid.*, para. 10.

²⁷ *Ibid.*

²⁸ The UK House of Commons and House of Lords subsequently discussed amendments to the future Marriage (Same Sex Couples) Act 2013, aimed at introducing a conscience clause for civil servants in the Bill. Both attempts were, however, defeated by a large majority (340-150 in the House of Commons, 278-103 in the House of Lords). *See* HC Deb 20 May 2013, vol 563, cols 926-66; HL Deb 8 July 2013, vol 747, cols 39-62.

In the Netherlands, the most recent figures show that 88 civil servants object to registering same-sex marriages.²⁹ In Dutch legal and political discourse, such civil servants are referred to with a specific term: *weigerambtenaren* (objecting civil servants). Initially, *weigerambtenaren* were granted exemptions by the Dutch authorities.³⁰ Later, however, the authorities changed their mind and started explicitly³¹ rejecting the exemption approach, substituting it with a categorical resolution in favour of same-sex equality.³² This evolution culminated in a 2014 Act, promulgated by the Dutch legislator to – eventually³³ – put an end to the existence of *weigerambtenaren*.³⁴ The 2014 Act provides that persons who would contravene Dutch anti-discrimination legislation cannot be assigned to the post of civil servant.³⁵ Although the 2014 Act is phrased in neutral terms – and thus also applies to discrimination on other grounds than sexual orientation – its legislative history makes it abundantly clear that it is the result of a targeted legislative effort to curb the practice of conscientious objection by civil servants to the registration of same-sex marriages.³⁶

3 Analysis of the Practice in Terms of Toleration

At first glance, the approach of the UK courts and Dutch legislator seems unwarranted. On paper at least, exemption and accommodation approaches are more appealing: if a solution

²⁹ Memorie van Toelichting bij de Wet van 4 juli 2014 tot wijziging van het Burgerlijk Wetboek en de Algemene wet gelijke behandeling met betrekking tot ambtenaren van de burgerlijke stand die onderscheid maken als bedoeld in de Algemene wet gelijke behandeling [Explanatory Report to Act of 4 July 2014...], Tweede Kamer der Staten-Generaal, 2012-2013, dossier 33.344, nr. 6 (hereafter Explanatory Report to 2014 Act).

³⁰ Opinion 2002-25, *supra* note 8, para. 5.8; Opinion 2002-26, *supra* note 8, para. 5.7.

³¹ Opinion 2008-40, *supra* note 9, para. 3.30.

³² *Ibid.*, paras. 3.27-3.28.

³³ 'Eventually', because the 2014 Act does *not* prohibit currently employed civil servants from requesting an exemption. *See infra*, note 84 and accompanying text.

³⁴ 2014 Act, *supra* note 10.

³⁵ *Ibid.*, Article I.2.

³⁶ Explanatory Report to 2014 Act, *supra* note 29.

can be found that allows *all* parties to exercise their human rights – freedom of religion *and* same-sex equality – why not favour it? An analogous solution has, after all, been adopted in the case of abortion, on which legislation in the UK and the Netherlands contains a conscience clause for doctors and other health professionals.³⁷

Yet, the intuitive appeal of civil-servant-friendly approaches is betrayed by the firmness with which the UK courts and the Dutch legislator have rejected them. I therefore proceed on the hypothesis that defenders of exemption and accommodation approaches to the same-sex marriage/partnership case are missing something. I locate that something in the concept of toleration and, more particularly, in its limits.³⁸ I submit, in particular, that the decisions of the UK courts and the Dutch legislator are best understood as drawing the limits of toleration in the liberal State at the point where civil servants cause same-sex couples expressive harm.

3.1 *The Core Concept of Toleration and the Respect Conception of Vertical Toleration*

The principle of toleration has deep roots in the history of liberal thought. It dates back to at least the XVIIth Century and the works of – among others – John Locke and Pierre Bayle.³⁹

³⁷ Abortion Act 1967, s 4 (1); Wet van 1 mei 1981 houdende regelen met betrekking tot het afbreken van zwangerschap [Act of 1 May 1981 concerning rules with regard to the termination of pregnancy], Article 20 (2).

³⁸ For similar arguments, see Andrew Sabl, "'Virtuous to Himself': Pluralistic Democracy and the Toleration of Tolerations", in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), pp. 220-242; Kent Greenawalt, 'Religious Toleration and Claims of Conscience' 28 *Journal of Law and Politics* (2013), pp. 91-128; Yossi Nehushtan, 'What Are Conscientious Exemptions Really About?', 2 *Oxford Journal of Law and Religion* (2013), pp. 393-416. For contrary arguments, see François Boucher and Cécile Laborde, 'Why Tolerate Conscience?', *Criminal Law and Philosophy* (2014), DOI: 10.1007/s11572-014-9357-7 (arguing that exemptions cannot be explained in terms of toleration); Emanuela Ceva, 'Why Toleration Is Not the Appropriate Response to Dissenting Minorities' Claims', 23 *European Journal of Philosophy* (2015), pp. 633-651 (arguing that at least certain claims for accommodation, namely those by 'democratic dissenting minorities' (which include religious conscientious objectors), cannot be understood in terms of toleration).

³⁹ On John Locke and toleration, see Alex Tuckness, 'Locke's Main Argument for Toleration', in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), pp. 114-138. On Pierre Bayle, John Locke and toleration, see Rainer Forst, 'Pierre Bayle's Reflexive Theory of Toleration', in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), pp. 78-113.

Against the backdrop of the European Wars of Religions, both Locke and Bayle argued for the toleration of adherents to (certain) other religions, as the basis for a right to freedom of conscience.⁴⁰ Locke's and Bayle's argument for toleration was directed at their fellow citizens *and* at the State, as personified in the ruling monarch. As directed at the State, the argument was designed to restrict the monarch's power to use coercion against those who adhered to different religious denominations.

The language of toleration and tolerance has since survived the test of time.⁴¹ Not only has it remained a staple of liberalism,⁴² it is also ubiquitous in contemporary political and legal discourse. The European Court of Human Rights for instance insists that '[p]luralism, *tolerance* and broadmindedness are hallmarks of a "democratic society"'.⁴³ The Parliamentary Assembly of the Council of Europe recently claimed that reasonable accommodation 'applied in a spirit of *tolerance* [...] allows all religious groups to live in harmony in the respect and acceptance of their diversity'.⁴⁴ And the British Government proclaimed, in 2010, that 'Britain today is a far more diverse and *tolerant* society than it was a generation ago'.⁴⁵

Yet, the rather loose use of the language of tolerance in practical discourse conceals the specificity and complexity of the concept in political theory. Although radically different conceptions of toleration have been put forward in the recent literature,⁴⁶ the concept itself has

⁴⁰ Toleration was, however, not extended to all other believers or non-believers. Locke, in particular, rejected the toleration of Catholics and atheists.

⁴¹ I explain the difference between both below; *see infra* notes 48-51 and accompanying text.

⁴² *See* John Stuart Mill, *On Liberty* (London: John W. Parker & Son, 1859); Joseph Raz, 'Autonomy, Toleration, and the Harm Principle', in S. Mendus (ed.), *Justifying Toleration - Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988), pp. 155-176; John Rawls, *Political Liberalism* (expanded edition) (New York: Columbia University Press, 2005).

⁴³ *E.g.*, *S.A.S. v. France*, 1 July 2014, European Court of Human Rights, No. 43835/11, para. 128 (emphasis added).

⁴⁴ Parliamentary Assembly of the Council of Europe, *Tackling intolerance and discrimination in Europe with a special focus on Christians* (Resolution 2036 (2015)), para. 2 (emphasis added).

⁴⁵ HM Government, *The Equality Strategy – Building a Fairer Britain*, p. 6 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/85299/equality-strategy.pdf> accessed 4 January 2016 (emphasis added).

⁴⁶ *See for instance* Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge: Cambridge University Press, 2002) (introducing a conception of 'toleration as recognition'). For discussion, *see* Peter Jones, 'Toleration, Recognition and Identity', 14 *The Journal of Political Philosophy* (2006), pp. 123-143.

a clear and undisputed core.⁴⁷ Based on the key works of Preston King and Rainer Forst, that core can be described as consisting of three components.⁴⁸ Toleration firstly entails a negative element, often called the objection component: toleration only becomes relevant when one disapproves of the beliefs, actions or opinions of another. If one simply does not care about another's beliefs, actions or opinions, one cannot be tolerant of them, only indifferent towards them (which is not necessarily worse). Toleration secondly implies a positive element, generally referred to as the acceptance component: one is tolerant when one relies on positive considerations, for instance respect for freedom of conscience, that supersede the negative element of disapproval, without eliminating it. These positive elements lead one to not interfere with someone's beliefs, practices or opinions *despite* one's disapproval thereof. This is what makes toleration ambiguous: one disapproves of something, often strongly, but nevertheless decides not to interfere. Toleration finally has limits. At this point, the third and final element – the rejection component – comes in. The limits of toleration are reached when the positive considerations do *not* outweigh the negative element of disapproval. One thus rejects another's beliefs, practices or opinions, and – if one has the power to do so – intervenes in order to curb them.

From this core concept of toleration, two different conceptions can be distilled, depending on who the agent of toleration is, that is depending on who disapproves of another's beliefs, practices and/or opinions. When the agent of toleration is the State, we

⁴⁷ There exists some disagreement in the literature as to whether the existence of power relations between the agent and object of toleration should be part of the core concept of toleration and as to whether the objection component of toleration also includes dislike (in addition to disapproval). For discussion, see Catriona McKinnon, *Toleration - A Critical Introduction* (London: Routledge, 2006), pp. 18-34; Rainer Forst, *Toleration in Conflict - Past and Present* (Cambridge: Cambridge University Press, 2013), pp. 25-26; Emanuela Ceva and Federico Zuolo, 'A Matter of Respect: On Majority-Minority Relations in a Liberal Democracy', 30 *Journal of Applied Philosophy* (2013), p. 241.

⁴⁸ Preston King, *Toleration* (London: Frank Cass, 1976), pp. 21, 44 and 51; Forst, *supra* note 47, pp. 18, 20 and 23. Also of immediate relevance are Susan Mendus, *Toleration and the Limits of Liberalism* (London: MacMillan, 1989), pp. 9-10; Galeotti, *supra* note 46, pp. 20-22.

speak of vertical toleration,⁴⁹ that is toleration as a political practice by the State towards individuals.⁵⁰ When the agent is the individual, we are dealing with a horizontal situation,⁵¹ in which tolerance is a moral virtue in interpersonal relationships.⁵² The difference between both conceptions is neatly captured by the linguistic distinction between vertical *toleration* and horizontal *tolerance*. In this Article, I present an analysis in terms of the former conception, that is of vertical toleration as a political practice. I am not concerned with horizontal tolerance as a moral virtue in interpersonal relationships.

Historically, both horizontal tolerance and vertical toleration have a long pedigree. Both conceptions were central to classical accounts of liberalism, such as those of John Locke and John Stuart Mill.⁵³ Contemporary accounts of liberalism, however, tend to only incorporate tolerance as a moral virtue in interpersonal relationships.⁵⁴ Toleration as a political practice, conversely, now has a negative connotation and is often considered to have become obsolete.⁵⁵ David Heyd, for instance, argues that '[w]ith the establishment of modern liberal democracy ... the idea of toleration ... [has become] superfluous in its traditional political form [since] equality before the law and respect for the rights of individuals and minority groups tend to make toleration politically redundant'.⁵⁶

The reason for the shift in liberal thinking from a need for tolerance *and* toleration to a requirement of tolerance only is located in crucial differences between the autocratic State of the early modern times of Locke, Bayle and Mill, during which vertical toleration was

⁴⁹ Forst, *supra* note 47, p. 6; Peter Jones 'Toleration, Religion and Accommodation', 23 *European Journal of Philosophy* (2015), p. 546.

⁵⁰ Forst, *supra* note 47, p. 6.

⁵¹ *Ibid.*; Jones, *supra* note 49, p. 546.

⁵² Forst, *supra* note 47, p. 6.

⁵³ See *supra* note 39 and accompanying text and *infra* note 93 and accompanying text.

⁵⁴ See for instance Rawls *supra* note 42.

⁵⁵ For discussion, see Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford: Oxford University Press, 2012), Ch 1 – 'Tolerance or Toleration?'.
⁵⁶ David Heyd, 'Is Toleration a Political Virtue?', in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press, 2008), p 175.

considered both appropriate and necessary, and the liberal State as it exists today.⁵⁷ As a result of these differences, a number of obstacles arise that *prima facie* block the path towards contemporary conceptions of vertical toleration. Elsewhere, I dismantle these obstacles and carve out space for vertical toleration in and by the contemporary liberal State.⁵⁸ Here, I will explain why one obstacle in particular – the argument from human rights – requires us to rethink what toleration means, and under which circumstances it is an appropriate tool to deal with diversity.

The argument from human rights sets its sights on the objection component of toleration, which entails disapproval by someone with power (a majority; the State) of someone who lacks that power (a minority; a citizen). The argument from human rights is straightforward: persons do not wish to be disapproved of. They do not wish to see either themselves or their beliefs, practices and opinions tolerated – and nothing more – by the State.⁵⁹ Instead, they demand something beyond toleration: acceptance, respect and/or recognition.⁶⁰ The argument from human rights is, thus, an argument for a need to move *beyond* toleration. It can be applied both to horizontal tolerance and vertical toleration.⁶¹ What concerns us here is how the argument plays out in relation to vertical toleration. In that context, the argument can be summarised as follows: in the era of human rights, which give

⁵⁷ *Ibid.*; Jones, *supra* note 49.

⁵⁸ See [reference omitted for review purposes].

⁵⁹ Mendus, *supra* note 48, p. 159; John Horton, 'Toleration as a Virtue', in D. Heyd (ed.), *Toleration - An Elusive Virtue* (Princeton: Princeton University Press, 1996), p. 35; Maleiha Malik, 'Complex Equality: Muslim Women and the "Headscarf"', 68 *Droit et Société* (2008), p. 131.

⁶⁰ Horton, *supra* note 59, p. 36; Mendus, *supra* note 48, p. 159; Galeotti, *supra* note 46, pp. 10-11; Jan Dobbernack and Tariq Modood, 'Introduction - The Acceptance of Cultural Diversity in Europe: Theoretical Perspectives and Contemporary Developments', in J. Dobbernack and T. Modood (eds.), *Tolerance, Intolerance and Respect - Hard to Accept?* (London: Palgrave - MacMillan, 2013), p. 5.

⁶¹ See Ceva and Zuolo, *supra* note 47; Lori Beaman, "'It Was All Slightly Unreal': What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?", 23 *Canadian Journal of Women and the Law* (2011), pp. 442-463; Lori Beaman, 'Deep Equality', 27 *Nordic Journal of Religion and Society* (2014), pp. 89-111.

expression to the fundamental equality of all persons, the State should be in the business of respecting and protecting those human rights, *not* in the business of toleration.⁶²

Although the argument from human rights is a compelling one, it arguably overstates the case against vertical toleration. The argument does offer good reasons to reduce the scope for toleration in contemporary liberal States. It does not, however, make a solid case for the complete eradication of the concept. In other words, it presents a fair warning against vertical toleration, but does not offer reasons for its elimination from liberal vocabulary.⁶³

In order to salvage vertical toleration as a tool to deal with diversity in the face of the argument from human rights, certain steps need to be taken. First, the historical conception of toleration should be replaced by a modern one.⁶⁴ This historical conception of toleration is generally referred to as the permission conception. It dominated toleration discourse in the early modern times of Locke and Bayle and is based on the idea that the State should refrain from using its power to persecute individuals belonging to disapproved minorities. Instead, it should tolerate their presence on its territory, that is permit them to stay there. As Forst explains, '[a]s long as [persons'] expression of their differences [remained] within limits, that is, [was] a "private" matter, and as long as they [did] not claim equal public and political status, they [could] be tolerated'.⁶⁵ The permission conception of toleration thus cast the objects of toleration into an inferior status. It was, for that reason, labelled 'insulting' by Goethe and 'arrogant' by Kant.⁶⁶ Clearly, there is no room for a permission conception of toleration in the contemporary liberal State, in which all persons are to be treated with equal respect. Other, more modern conceptions of toleration are available, however.

⁶² Heyd, *supra* note 56, p. 177; Galeotti, *supra* note 46, p. 2.

⁶³ See also Ceva and Zuolo, *supra* note 47, p. 248.

⁶⁴ For a critique of respect-based conceptions of tolerance/toleration, see Enzo Rossi, 'Can Tolerance be Grounded in Equal Respect?', 12 *European Journal of Political Philosophy* (2013), pp. 240-252 (answering the titular question in the negative).

⁶⁵ Rainer Forst, 'The Limits of Toleration', 11 *Constellations* (2004), p. 315; Forst *supra* note 47, pp. 29-30.

⁶⁶ By Goethe and Kant, respectively. See Forst, *supra* note 65, p. 316 and Forst, *supra* note 47, p. 334, respectively.

On the respect conception of toleration, in particular, it is never appropriate for the State to disapprove of *persons*.⁶⁷ The State should treat persons with equal respect, not tolerate them. It can, however, tolerate persons' *practices and opinions*.⁶⁸ On the respect conception of toleration, persons are thus always the focus of equal respect, while their practices and opinions can be the focus of toleration.⁶⁹ Discarding the permission conception for the respect conception of toleration is a crucial first step in addressing the argument from human rights and rendering vertical toleration congenial to the contemporary liberal State.⁷⁰

3.2 *The Limited Space for Toleration in the Contemporary Liberal State*

But addressing the argument from human rights requires more. It also requires that the space for vertical toleration in and by the contemporary liberal State be duly limited. Given the peremptory force of human rights, the liberal State should not only respect persons, but in principle also their practices and/or opinions. Any space for vertical toleration in the contemporary liberal State should, therefore, be duly limited. I propose that such space nevertheless opens up in particular circumstances, namely when persons' practices or opinions *prima facie* infringe the core liberal values of equality, liberty (human rights) and/or autonomy.⁷¹ In those particular circumstances, the liberal State arguably has cause to disapprove of the practices or opinions at issue. Hence, the question of whether or not to tolerate them arises.

⁶⁷ Forst, *supra* note 47, p. 30; Thomas Scanlon, 'The Difficulty of Tolerance', in D. Heyd (ed.), *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996), pp. 226-239.

⁶⁸ *Ibid.*; Veit Bader 'Moral Minimalism and More Demanding Moralities: Some Reflections on "Tolerance/Toleration"', in J. Dobbernack and T. Modood (eds.), *Tolerance, Intolerance and Respect - Hard to Accept?* (London: Palgrave - MacMillan, 2013), p. 37.

⁶⁹ Bader, *supra* note 68, p. 37.

⁷⁰ On the right to equal concern and respect, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).

⁷¹ Those who are wary of autonomy, political liberals for instance, may wish to limit the list to equality and liberty.

A number of examples serve to further elucidate the argument.⁷² A first set of cases illustrates why the space for vertical toleration in the liberal State is limited. These are cases in which the liberal State has no cause for disapproval. Thus, toleration does not even enter the scene. A large number of trivial examples could be offered here, for within this category falls a wide array of practices and opinions that do not *prima facie* contravene basic liberal values. Eating an ice cream on a hot summer day and telling those around you to do the same, for instance, fall into this category of utterly trivial examples in which there is no room for toleration by the liberal State. But the same goes for *prima facie* more difficult cases. Take, for instance, the case of Muslim women wearing the *niqab* or *burqa* in public. This religious practice is prohibited under criminal law in France and Belgium, and is currently the object of proposed bans in other countries, including the Netherlands.⁷³ Yet, by wearing a *niqab* or *burqa*, Muslim women do not contravene core liberal values. They do not violate others' or their own equality, human rights or autonomy. Some might object that they do contravene their own autonomy and/or equality. Such arguments, however, have been thoroughly dispelled in the facts by empirical research⁷⁴ and firmly rejected in law by the European Court of Human Rights.⁷⁵ Since Muslim women who wear a *niqab* or *burqa* do not contravene core liberal values, their practice should not be assessed in terms of toleration. There is simply no room for disapproval by the liberal State here. To be clear, this does not have conclusive consequences for the different question as to whether or not the practice can (or should) be

⁷² For discussion of additional examples, see [reference omitted for review purposes].

⁷³ Maarten Back, 'Kabinet stemt in met beperkt "boerkaverbod"', *NRC*, 22 May 2015, <www.nrc.nl/nieuws/2015/05/22/kabinet-stemt-in-met-beperkt-boerkaverbod>, accessed 2 January 2016.

⁷⁴ See Eva Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge: Cambridge University Press, 2014) (several chapters offer empirical data - quantitative and qualitative - showing that the vast majority of women wearing the *niqab* or *burqa* do so out of free will).

⁷⁵ *S.A.S.*, *supra* note 41, para. 119 ('a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions').

banned. Although I submit that the practice should be allowed,⁷⁶ my primary aim has been to argue that it should not be analysed in terms of toleration.⁷⁷

If there is no room for toleration in the preceding situations, then when does the limited space for vertical toleration by the liberal State open up? In the context of this Article, which focuses on conscientious objection, the prime example of toleration by the liberal State is arguably its response to conscience-based refusals to abortions. In most liberal States, including the UK and the Netherlands, conscience clauses in abortion legislation grant exemptions to doctors (and other health professionals) who conscientiously object to performing abortions.⁷⁸ On my argument for vertical toleration, these are situations in which the liberal State has cause for disapproval. Indeed, the State may principally disapprove of a doctor's refusal to perform abortions, since it *prima facie* contravenes the basic liberal values of equality (gender equality), human rights (right to private life and potentially right to health of the woman who wishes to undergo an abortion),⁷⁹ and autonomy (decisional privacy of the woman). But given that UK and Dutch abortion legislation contain conscience clauses, the practice is tolerated, not banned, by those States. States like the UK and the Netherlands may principally disapprove of refusals to grant women access to abortion services (rejection component of vertical toleration), but nevertheless do not force doctors and other health professionals to perform abortions when they cite conscientious objections (acceptance component of vertical toleration). They do so to safeguard freedom of religion. That makes it a prime example of vertical toleration.⁸⁰

⁷⁶ Because the remaining counterarguments based on, among others, public order and *vivre ensemble* fail to convince.

⁷⁷ They can, however, be analyzed in 'pure' human rights terms, as restrictions potentially justified by a need to protect public order and *vivre ensemble*.

⁷⁸ See references *supra* note 37.

⁷⁹ The right to life of the woman is not listed in the text, because conscience clauses normally provide for exceptions - in which the doctor cannot claim an exemption - in life threatening situations. See for instance Abortion Act 1967, s 4(2).

⁸⁰ Nehushtan, *supra* note 38, p. 396.

4 Conscientious Objection to Same-Sex Marriages: Beyond the Limits of Toleration

So far, I have discussed cases that fall outside the scope for vertical toleration and cases that are the object of toleration. What remains to be done, is to explore the limits of toleration. The primary case study of this Article, on civil servants who conscientiously refuse to register same-sex marriages/partnerships, elucidates when the limits of vertical toleration have been exceeded.

4.1 *Drawing the Limits of Toleration*

Conscience-based refusals by civil servants to registering same-sex marriages/partnerships warrant disapproval by the liberal State, since they *prima facie* contravene the core liberal value of equality (discrimination on the basis of sexual orientation). Unlike in the abortion case, the UK courts and Dutch legislator have, however, intervened to curb the practice. It is submitted here that the relevant decisions can successfully be explained in terms of the limits of toleration.

The Dutch legislative debate on the 2014 Act, in particular, was firmly rooted in the language of toleration. In delivering its negative advice on the 2014 Act, which bars persons who would contravene anti-discrimination legislation from obtaining the post of civil servant, the Dutch Council of State insisted that '[a] pragmatic approach, which fits in the Dutch

tradition of toleration *vis-à-vis* divergent opinions, would be the obvious route to take.⁸¹ The proponents of the 2014 Act, however, vehemently disagreed. They conceded that 'giving space to conscientious objections in general fits in the Dutch tradition of toleration *vis-à-vis* different religious conceptions', but immediately added that 'unfortunately there are, in Dutch society, also developments that contravene this tradition [...] The problem is that religions are not always as tolerant.'⁸² The proponents of the 2014 Act concluded that '[w]hat *can* help in a climate of intolerance, is not the search for "pragmatic solutions" for the consequences of that intolerance, but the consistent upholding of the prohibition of discrimination.'⁸³ The 2014 Act was thus intended to put an end to intolerance in society. In other words, it refused to extend toleration to those who would act intolerantly.

An interesting feature of the Dutch 2014 Act, however, is that it draws the limits of toleration in relation to *future* civil servants, while simultaneously engaging in toleration towards *currently employed* civil servants. Indeed, the 2014 Act – by design⁸⁴ – does not apply to currently employed civil servants, even when they object to registering same-sex marriages. The reason is a pragmatic one: the legislator did not wish to intrude on the competence of municipalities to determine what to do with currently employed civil servants. The legislator did, however, clearly disapprove of the practice at issue (disapproval thereof

⁸¹ Council of State (the Netherlands), Advice W04.12.0331/I (12 October 2012) (author's translation; original: 'Een pragmatische benadering, welke past in de Nederlandse traditie van tolerantie ten opzichte van afwijkende opvattingen, zou dan ook voor de hand liggen.'). It should be noted that the Dutch language does not distinguish between toleration and tolerance. In Dutch, there exists only one word: *tolerantie*. It has been translated as 'toleration' in the text, since that seems to me to be a fair interpretation.

⁸² Explanatory Report to 2014 Act, *supra* note 29 (emphasis in original; author's translation; original: 'ruimte geven aan gewetensbezwaren in zijn algemeenheid past in de Nederlandse traditie van tolerantie ten opzichte van verschillende godsdienstige opvattingen [...] helaas zijn er in de Nederlandse samenleving ook ontwikkelingen, die haaks staan op deze traditie [...] Het probleem is, dat godsdiensten niet altijd even tolerant zijn.').

⁸³ *Ibid.* (emphasis in original; author's translation; original: 'Wat in een klimaat van intolerantie wèl kan helpen, is het niet louter zoeken van "pragmatische oplossingen" voor de gevolgen van die intolerantie, maar het consequent handhaven van het verbod van discriminatie.').

⁸⁴ *Ibid.*

was, after all, the very reason for the adoption of the 2014 Act).⁸⁵ Hence, currently employed civil servants who refuse to register same-sex marriages are (temporarily) tolerated in the Netherlands, at least insofar as the Dutch legislator is concerned.⁸⁶

Contrary to the Dutch legislative debate on the 2014 Act, the UK courts' rulings are not replete with the language of toleration. This can be explained by the more restrictive role of the judiciary, which is – in principle – to apply the law, not 'decide on the rights and wrongs of toleration'.⁸⁷ Although the language of tolerance and toleration does occasionally crop up in judicial rulings,⁸⁸ it is arguably more congenial to political debate.⁸⁹ Unlike political bodies, courts are limited to the use of legal language. It should thus not come as a surprise that, in judicial rulings, the language of toleration is generally replaced by language with which the law is more familiar. In the UK case of *Lillian Ladele*, this was the language of reasonable accommodation and of (indirect) discrimination. Yet, this does not detract from the fact that the UK courts have given practical effect to the same underlying idea as the one explicitly relied on by the Dutch legislator: in a liberal State, the practice of civil servants who refuse to register same-sex marriages/partnerships exceeds the limits of toleration, and can therefore not be allowed.⁹⁰

4.2 *Why Draw the Limits There? Toleration and Expressive Harm*

⁸⁵ This is further underscored by the fact that the 2014 Act includes an amendment to the antidiscrimination law that would allow municipalities to dismiss civil servants without running the risk of being found in violation of antidiscrimination legislation. See 2014 Act, *supra* note 10, Article II.3.

⁸⁶ It is, of course, open to municipalities to dismiss the persons concerned.

⁸⁷ Jones, *supra* note 49, p. 555.

⁸⁸ See *supra* note 43 and accompanying text.

⁸⁹ This is underscored by the subsequent debate in Parliament, in which several proponents of amendments to the Marriage (Same Sex Couples) Bill argued in terms of tolerance and toleration. See HC Deb 20 May 2013, vol 563, cols 926-66; HL Deb 8 July 2013, vol 747, cols 39-62. The debate in the House of Lords, in particular, was to a significant extent phrased - by the supporters of the amendment - in terms of "tolerance/toleration" by the government towards 'a small minority' (the affected registrars). These arguments did not succeed, however. This shows implicit approval by the UK legislator of the judicial solution reached in *Ladele*, *supra* note 7.

⁹⁰ The author is grateful to Robert Wintemute for discussion on this point, and for suggesting the approach offered in the text.

I have submitted that the UK courts' ruling and the Dutch 2014 Act can be understood in terms of the limits of toleration. Yet, the question remains: *why* were those limits exceeded? After all, in neither the UK, nor the Netherlands, were same-sex couples denied a public service. They thus did not suffer any material harm.⁹¹ Here, I argue that the limits of toleration were nevertheless exceeded because same-sex couples suffered *expressive* harm.⁹²

Ever since John Stuart Mill wrote *On Liberty*, the liberal tradition has recognised the existence of a strong link between toleration and harm, in the sense that the limits of toleration should be drawn by some version of the harm principle.⁹³ How broad or narrow one conceives of these limits is determined by how one interprets harm. I submit that the Dutch legislator's and the UK courts' decisions are best understood in terms of *expressive* harm.

The notion of expressive harm is directly related to the expressive function of law: the law should express appropriate attitudes toward persons.⁹⁴ The "appropriate" attitude is generally interpreted as one of equal concern and respect.⁹⁵ Law can be expressive in a positive sense, for instance when a State adopts criminal hate speech legislation to send the expressive message, over and beyond the repressive function of the criminal law, that all

⁹¹ For a contrary argument, see Wintemute, *supra* note 2, pp. 241-242 (presenting an analysis of the *Ladele* case in terms of material harm in the form of denial of services).

⁹² For a contrary argument, see Leigh and Hambler, *supra* note 7 (arguing that the harm caused was 'purely notional and amounted to no more than "bare knowledge offence"').

⁹³ Raz, *supra* note 41, p. 174; Glyn Morgan, 'The Mode and Limits of John Stuart Mill's Toleration', in M. Williams and J. Waldron (eds.), *Toleration and Its Limits* (New York: New York University Press 2008), p. 154.

⁹⁴ On the expressive function of law, see Elizabeth Anderson and Richard Pildes, 'Expressive Theories of Law: A General Restatement', 148 *University of Pennsylvania Law Review* (2000), pp. 1503-1575; Cass Sunstein, 'Incommensurability and Valuation in Law', 92 *Michigan Law Review* (1994), pp. 779-861; Cass Sunstein, 'On the Expressive Function of Law', 144 *University of Pennsylvania Law Review* (1996), pp. 2021-2053. For critiques, see Matthew Adler, 'Expressive Theories of Law: A Skeptical Overview', 148 *University of Pennsylvania Law Review* (2000), pp. 1363-1501; Simon Blackburn, 'Group Minds and Expressive Harm', 60 *Maryland Law Review* (2001), pp. 467-491.

⁹⁵ Anderson and Pildes, *supra* note 94, p. 1520 (with reference to Dworkin on the link with 'equal concern and respect').

individuals in society are worthy of equal respect.⁹⁶ State action can, however, also take a negative expressive turn, namely when it causes expressive harm.

Expressive harm is, then, the harm suffered by a person 'when she is treated [by the State] according to principles that express negative or inappropriate attitudes toward her'.⁹⁷ Expressive harm is thus closely linked with the notion of "second-class citizenship".⁹⁸ Arguably the historically most prominent example is that of racial segregation, as it was once practiced in the United States.⁹⁹ Racial segregation causes expressive harm because it 'sends the message that blacks are untouchable, a kind of social pollutant from which "pure" whites must be protected'.¹⁰⁰ It is important to note, as illustrated by the racial segregation example, that expressive harm is not only caused by verbally communicated messages, but also by non-verbal State action.¹⁰¹

I submit that the decisions of the UK courts and the Dutch legislator are best understood as recognising that civil servants were causing expressive harm to same-sex couples by refusing to register same-sex marriages/partnerships. Not only were they acting as State agents, their duties of registration were also directly identified as State duties.¹⁰² By refusing to register same-sex marriages and partnerships, the civil servants failed to treat

⁹⁶ Sunstein, 'Incommensurability and Valuation in Law', *supra* note 94, p. 823 ('A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.').

⁹⁷ Anderson and Pildes, *supra* note 94, p. 1527.

⁹⁸ *Ibid.*, p. 1537.

⁹⁹ *Ibid.*, p. 1527; Jessie Hill, 'Expressive Harms and Standing', 112 *Harvard Law Review* (1999), pp. 1313, 1314.

¹⁰⁰ Anderson and Pildes, *supra* note 94, p. 1527.

¹⁰¹ *Ibid.*, p. 1565; Richard Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism', 27 *Journal of Legal Studies* (1998), p. 726; Hill, *supra* note 99, p. 1314.

¹⁰² This point was also emphasised by the Dutch legislator. See Explanatory Report to 2014 Act, *supra* note 29.

same-sex couples with equal respect.¹⁰³ It is, indeed, difficult to conceive of the refusals as anything other than instances in which State agents treated LGBT as second-class citizens.¹⁰⁴

An objection could be raised against the above characterisation, however, by insisting that no harm – expressive or otherwise – was caused to same-sex couples, because individual couples were not even *aware* of the civil servants' refusal.¹⁰⁵ Two responses to this argument are available. The first, practical, response is that the facts of Lillian Ladele's case reveal that it is difficult to keep these kinds of refusals hidden.¹⁰⁶ They are likely, sooner or later, to become public knowledge. The second, principled, response is that expressive harm can be caused without the subject of the message being aware of it. Expressive harm does not require knowledge.¹⁰⁷ It is caused by the action *itself*, here the refusal by the civil servant, and does not depend on it being received by an audience.¹⁰⁸

The above arguments on the expressive function of law and expressive harm find support in the rulings of the UK courts and the decision of the Dutch legislator. In the case of Lillian Ladele, the UK courts dismissed the reasonable accommodation route, because insistence thereon 'mischaracterised Islington's aim by treating it as a purely practical one of delivering an efficient system'.¹⁰⁹ Instead, the courts identified Islington's proper aim as that of providing a service 'which complied with their overarching policy of being "an employer

¹⁰³ For similar arguments, see Ira Lupu and Robert Tuttle, 'Same-Sex Equality and Religious Freedom', 5 *Northwestern Journal of Law & Social Policy* (2010), p. 294; Jones, *supra* note 49, p. 557.

¹⁰⁴ The analogy with (hypothetical) refusals to register mixed race marriages appears obvious. See MacDougall, *supra* note 2, p. 357; Mark Strasser, 'On Same-Sex Marriage and Matters of Conscience', 17 *Williams & Mary Journal of Women and the Law* (2010), pp. 26-27 and 32-33. For criticism, see Greenawalt, *supra* note 38, pp. 112-114; Thomas Berg, 'What Same-Sex-Marriage and Religious-Human rights Claims Have in Common', 5 *Northwestern Journal of Law and Social Policy* (2010), pp. 234-35.

¹⁰⁵ In the UK *Ladele* case, this was initially the case, as transpires from the facts of the case. In the Netherlands, couples apply to the municipality first and are then assigned a civil servant (which will obviously be a non-objecting civil servant). See Bruce MacDougall *et al.*, 'Conscientious Objection to Creating Same-Sex Unions: An International Analysis', 1 *Canadian Journal of Human Rights* (2012), p. 138.

¹⁰⁶ Wintemute, *supra* note 2, p. 242.

¹⁰⁷ Anderson and Pildes, *supra* note 94, p. 1545.

¹⁰⁸ *Ibid.*; Hill, *supra* note 99, p. 1317. See also MacDougall, *supra* note 2, p. 357 (discussing an analogous case of civil servants passing around files of 'members of certain ethnic groups whom some employees find "objectionable"' and concluding that both instances are wrong, despite taking place outside public knowledge).

¹⁰⁹ *Ladele*, *supra* note 7, para. 45.

and a public authority *wholly committed to the promotion of equal opportunities* and to requiring all its employees to act in a way which does not discriminate against others".¹¹⁰ The courts ruled that 'Ms Ladele's proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars *manifest equal respect for the homosexual community*'.¹¹¹ These passages are best understood in terms of expressive harm and the expressive function of Islington's non-discrimination policy.¹¹²

Similar considerations apply to the Dutch case, where the 2014 Act was adopted for both principled and symbolic reasons.¹¹³ A crucial reason for the adoption of the 2014 Act was the legislator's insistence that '[w]hat *can* help in a climate of intolerance, is not the search for "pragmatic solutions" for the consequences of that intolerance, but the consistent upholding of the prohibition of discrimination'.¹¹⁴ The Dutch government underscored the expressive aim of the 2014 Act by referring to its passing as 'an important step that partly has a symbolic character',¹¹⁵ and by stating that

with this [Act] *a message is being sent*, not only towards this category of registrars, but in the first place to all gays and lesbians in the Netherlands and eventually towards Dutch society as a whole: the norm is that we in no way wish

¹¹⁰ *Ibid.* (emphasis added). Islington's Dignity for All Policy states, *inter alia*, that '[a]ll employees are expected to promote [the] values [of equality and greater diversity] at all times'. See *ibid.*, para. 9.

¹¹¹ *Ibid.*, para. 55 (emphasis added).

¹¹² For a similar analysis of *Ladele*, see Jones, *supra* note 49, p. 557. See also Ronan McCrae, 'Religion in the Workplace: *Eweida and Others v United Kingdom*', 77 *Modern Law Review* (2014), p. 283; Howard, *supra* note 2, p. 156 (both arguing that the case involves infringements of dignity).

¹¹³ Explanatory Report to 2014 Act, *supra* note 29.

¹¹⁴ See *supra* note 83.

¹¹⁵ Handelingen Tweede Kamer der Staten-Generaal, 2012-2013, dossier 33.344, nr. 91, item 6 (author's translation; original: 'een belangrijke stap die voor een deel een symbolisch karakter heeft').

to differentiate between persons of equal sex who get married and persons of different sex who get married.¹¹⁶

To sum up, in both the UK and the Netherlands, the limits of toleration were drawn to prevent State agents from causing further expressive harm to same-sex couples. The Dutch 2014 Act and Islington's non-discrimination policy further pursued the expressive aim of ensuring that all citizens – including LGBT – would be treated with equal concern and respect.¹¹⁷

5 Conclusion: Explaining Differences + Brief Foray into other Cases

In this Article, I have argued that there exists limited space for vertical toleration in the contemporary liberal State. Such limited space opens up in particular circumstances, namely when persons' practices and/or expressed opinions contravene basic liberal values (equality, human rights and autonomy). Liberal States like the UK and the Netherlands nevertheless tolerate some such practices, including conscientious objections by health professionals to the performance of abortions. Yet, those same States refuse to extend toleration to civil servants who conscientiously refuse to register same-sex marriages/partnerships. I have argued that both the UK courts' rulings in the Lillian Ladele case and the Dutch 2014 Act draw the limits of toleration at the point where State agents cause same-sex couples expressive harm.

¹¹⁶ *Ibid.* (emphasis added; author's translation; original: 'Ook wordt hiermee een boodschap gestuurd, niet alleen in de richting van deze categorie ambtenaren, maar allereerst in de richting van alle homo's en lesbo's in Nederland en uiteindelijk in de richting van de hele Nederlandse samenleving: de norm is dat wij op geen enkele wijze onderscheid wensen te maken tussen mensen van gelijk geslacht die trouwen en mensen van verschillend geslacht die trouwen').

¹¹⁷ This is subject to the understanding that the Dutch 2014 Act only operates towards the future. *See supra* notes 84-86 and accompanying text.

What remains to be done here, in the conclusion, is to provide an explanation as to why the same States that extend toleration to health professionals who refuse to perform abortions, deny it to civil servants who refuse to register same-sex marriages/partnerships. Parallels should also be drawn to other cases, namely those of private persons (such as bed and breakfast owners) who refuse to deliver services to same-sex couples, and conscientious objections to military service.

First, some explanations will be offered for the difference in treatment of health professionals in the abortion case and civil servants in the same-sex marriage/partnership case. The question is: what makes the abortion case so different from the same-sex marriage/partnership case that the former would invite toleration, while the latter exceeds the limits of toleration? One possible explanation is that health professionals and civil servants hold different statuses, the latter being public officials, while the former are private persons. But this does not provide a satisfactory answer, since conscience clauses in abortion legislation also apply to health professionals in public hospitals, that is to public officials. The explanation for the difference must thus be located elsewhere.

A few hypotheses can be ventured. First, a hypothesis on the nature of the actions performed. In the same-sex marriage/partnership case, being forced to act against one's conscience entails having to register a same-sex marriage or partnership by signing a piece of paper. In the abortion case, conversely, it requires active and personal involvement in the termination of what one considers to be life.¹¹⁸ There are, thus, important differences between the abortion and the same-sex marriage/partnership case: the doctor's action in the abortion case is both graver *and* more directly related to her conscience than that of the civil servant in

¹¹⁸ The UK Supreme Court has interpreted the conscience clause in the Abortion Act 1967 in that sense. According to the Supreme Court, the decisive criterion for granting an exemption in the abortion case is the 'actually taking part', in a 'hands-on capacity', in the performance of abortions. *Greater Glasgow Health Board v. Doogan & Anor*, 17 December 2014, United Kingdom Supreme Court, [2014] UKSC 68, paras. 37-38.

the same-sex marriage/partnership case.¹¹⁹ These differences arguably go a long way towards explaining why toleration is extended in the abortion case, but not in the same-sex marriage/partnerships case. A second hypothesis complements the first: the doctor's refusal is more easily accessible in the language of public reason. The doctor's refusal can, more particularly, be expressed in secular language on the value of (or right to) life, which is accessible to all persons, including those who hold different beliefs.¹²⁰ The civil servant's objection, conversely, can only sensibly be expressed in religious terms. To non-believers, including the State, it will – as the practice shows – tend to come across as homophobia, since it cannot easily be detached from conservative religious views that categorise same-sex conduct as a "sin". Both hypotheses, when combined, arguably explain the difference between the same-sex marriage/partnership and the abortion case. They explain why the latter is tolerated in liberal States like the UK and the Netherlands, while the former is not.

Closely related to the same-sex marriage/partnership cases studied in this Article, are cases in which *private persons* refuse to facilitate same-sex marriages/partnerships.¹²¹ A prominent legal case is that of *Bull v. Hall*, involving Christian bed and breakfast owners in the UK who refused to let a double room to a same-sex couple.¹²² The UK Supreme Court ruled against the bed and breakfast owners, finding that they had unjustly discriminated against the same-sex couple. The practice of the bed and breakfast owners was thus, just like that of civil servants, not tolerated. There are, however, crucial differences between both cases. Most importantly, the bed and breakfast owners are private citizens, not State agents.

¹¹⁹ In that sense, as Nejaime and Siegel have usefully pointed out, the relevant comparator to the doctor in the abortion case is not the civil servant refusing to register a same-sex marriage, but a member of the clergy refusing to solemnize a same-sex marriage. Interestingly, this more comparable situation is, like the abortion case, generally covered by an exemption: members of the clergy cannot be forced to solemnize same-sex marriages. This offers further support for the hypothesis ventured in the text. See Douglas Nejaime and Reva Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics', 124 *Yale Law Journal* (2015), pp. 2561-2562.

¹²⁰ See also Horton, *supra* note 59, p. 39; Wintemute, *supra* note 2, p. 247.

¹²¹ See e.g., *Elaine Photopgraphy, LLC v. Willock*, 22 August 2013, Supreme Court of New Mexico, No. 2013-NMSC-040; *Bull & Anor v. Hall & Anor*, 27 November 2013, United Kingdom Supreme Court, [2013] UKSC 73; *Craig v. Masterpiece Cakeshop, Inc.*, 13 August 2015, Court of Appeals of Colorado, No. 14CA1351.

¹²² *Bull v. Hall*, *supra* note 121.

Since expressive harm is intimately tied to State action, the explanation offered in this Article as to why the limits of toleration were exceeded in the case of the civil servants cannot be extended to the bed and breakfast owners. The question therefore arises: where is the harm in the bed and breakfast case? The obvious answer is that the case entails *material* harm: denial of services.¹²³ This explains why the practice in the bed and breakfast case is not tolerated, just like the practice of the civil servants.¹²⁴

The final case to be considered is that of conscientious objection to military service. Here, interestingly, exemptions are usually granted to both religious and non-religious objectors, provided that they base themselves on sincerely held beliefs or convictions. Where do these cases fit in the argument presented in this Article? I submit that they fall outside the scope for vertical toleration in the liberal State, since they do not entail practices that contravene basic liberal values. A person who objects to the performance of military service (whether for religious or non-religious reasons) may be seen as jeopardising national security or other public interests, but she does not contravene her own or others' equality, human rights or autonomy. Thus, the liberal State has no cause to disapprove of her practices, as such.¹²⁵ In other words, conscientious objection to military service should, just like the case of the

¹²³ See also Wintemute, *supra* note 2, p. 251 (arguing that, since the service will generally be 'refused to the face of the customer', it causes direct harm). See further Ilias Trispiotis, "'Alternative Lifestyles' and Unlawful Discrimination: The Limits of Religious Freedom in *Bull v Hall*", *European Human Rights Law Review* (2014), p. 46 (arguing, in relation to *Bull & Anor v. Hall & Anor*, that the Supreme Court 'locates the harm ... in the relationship between "stigma, denial of opportunities and the historical facts of disadvantage"' (footnote with literature reference omitted)).

¹²⁴ For a similar analysis, see Chai Feldblum, 'Moral Conflict and Human rights: Gay Rights and Religion', 72 *Brooklyn Law Review* (2006), pp. 119-120 (arguing that the government should not tolerate bed and breakfast owners who exclude same-sex couples).

¹²⁵ It may consider the importance of national security, but this is not a basic liberal value. It being potentially in jeopardy is thus not, on the argument presented in this Article, a cause for disapproval by the liberal State (although it might still be cause to refuse to grant an exemption).

Muslim woman who wears a *burqa* or *niqab* in public, not be analysed in terms of toleration.¹²⁶

As it turns out, the arguments on vertical toleration I have presented in this Article can successfully be applied to a wide variety of conscientious objection cases. They moreover offer a coherent explanation for the relevant practice in liberal States like the UK and the Netherlands. Vertical toleration is thus not a relic of the past. Although it should only be extended in limited circumstances, like the abortion case, it remains an important tool for the liberal State to tackle diversity. Duly limited by the harm principle, theories on vertical toleration further explain why exemptions are denied to civil servants who refuse to register same-sex marriages/partnerships. Their practices are not tolerated by the liberal State.

¹²⁶ Compare Wintemute, *supra* note 2, p. 229 (listing conscientious objection to military services among those cases in which no harm is caused and in which accommodation involves minimal costs; and should therefore be granted).